Supreme Court, U.S.
FILED
DEC 2 , 2005
OFFICE OF THE CLERK

Nos. 04-1034, 04-1384

In The Supreme Court of the United States

JOHN A. RAPANOS, ET AL.

Petitioners,

v.

UNITED STATES,

Respondent

JUNE CARABELL, ET AL.

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Writs of Certiorari to
The United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONERS

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United States v. Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. 2002), *aff'd*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) 3, 22

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Permits for Activities in Navigable Waters,
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Resp. Cert. Br. in Opp'n,
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Design and Construction of Urban Stormwater Management Systems (Am. Soc'y of Civil Eng'rs Pub. 1992) 10

Dan B. Dobbs, *The Law of Torts* (2000) 29

The Macomb Daily, *Boat Jam* (June 13, 2003), *available at* http://204.176.34.196/macombdaily/articles.asp?ID=8560595 14

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I Laurence Tribe, *American Constitutional Law* (3d ed. 2000) 5, 6

Ben Urbonas, *et al.*, *Stormwater, Best Management Practices and Detention for Water Quality, Drainage, and CSO Management* (1993) 10

U.S. Dep't of Transp., Federal Highway Admin., Highway Statistics 2001 § V, Roadway Extent, Characteristics, and Performance Tbl. HM-10, *at* http://www.fhwa.dot.gov/ohim/hs01/hm10.htm (last visited Nov. 10, 2005) 12

INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *amicus curiae* brief supporting Petitioners.[1] NAHB represents over 220,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. Its members are frequently subject to regulations under the Clean Water Act ("CWA"). As a result, NAHB has developed comprehensive familiarity with the CWA's permitting requirements, provides compliance advice to its members, and, unfortunately, has witnessed numerous situations where federal regulators have exercised their authority beyond the CWA's limits. NAHB has thus been before the Court as *amicus curiae* in the cases listed in Appendix A ("App. 1a") to this brief, involving landowners who have been aggrieved by over-zealous regulation under the CWA and other statutes and programs.

SUMMARY OF ARGUMENT

(1) ***Point Sources are not Navigable Waters:*** The Court of Appeals ruled that ordinary drainage ditches at the *Rapanos* and *Carabell* sites are "navigable waters." Moreover, in *Carabell* the ditches drain into, or are part of, a municipal storm sewer system which has been permitted under CWA Section 402 to control pollutant discharges.

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

Congress intended ditches and storm sewers to be regulated as "point sources," not as "navigable waters," and the Court of Appeals should be reversed accordingly.

(2) ***Adjacent to "Open Waters":*** This Court has held that wetlands are subject to the CWA if they are immediately adjacent to "open water." The Court of Appeals should be reversed because it stretched the CWA to reach wetlands immediately adjacent to "point sources."

(3) ***"Significant Nexus" Should Consider Downstream Impact:*** This Court has established the principle that the CWA covers non-navigable features with a "significant nexus" to navigable-in-fact water. A "significant nexus" inquiry in any given case is highly fact sensitive and must consider whether upstream activity in a non-navigable feature causes tangible impact on downstream navigable-in-fact waters.

ARGUMENT

I. DITCHES, MUNICIPAL STORM SEWER SYSTEMS, AND OTHER POINT SOURCES ARE NOT CWA "NAVIGABLE WATERS."

The CWA's regulatory scheme, for all its detail, is quite simple. Congress intended to regulate pollutants *going into* "navigable waters," by requiring permits to control pollutants *coming out of* "point sources." *See* 33 U.S.C. § 1311(a) (prohibiting the "discharge of pollutants" unless permitted elsewhere in the Act). The Court of Appeals never considered this distinction, and should not have afforded *Chevron* deference to the Corps's interpretation that "point sources" are CWA "navigable waters."

A. Ditches and Drains.

Rapanos concerns three separate properties in different Michigan counties: (1) the 175-acre Salzburg site which lies next to the Labozinski Drain, described by the lower courts as a manmade ditch. *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1014 (E.D. Mich. 2002) (a "ditch which empties into Hoppler Creek"), *aff'd*, 339 F.3d 447, 449 (6th Cir. 2003) (a "one hundred year-old manmade drain"); (2) the 600-acre Hines Road site, which is embroidered with drainage ditches and is itself drained by a ditch called the Rose Drain. (Cert. App. B19); and (3) the 49-acre Pine River site, with onsite wetlands that are adjacent to ditches. (Cert. App. B24-B25.)

The 19.61 acre *Carabell* site in Macomb County, Michigan, is separated from adjacent property by an unnamed ditch. Sidecasted spoils from the ditch's excavation created an upland berm, which blocks drainage of surface water from the site. The direction of water flow from the ditch is unclear, although the ditch connects to another ditch known as the Sutherland-Oemig Drain at the site's northeastern corner. *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704, 705-06 (6th Cir. 2004). The Sutherland-Oemig drain is part of Macomb County's storm sewer system, which has received a pollutant discharge permit from the Michigan Department of Environmental Quality under Section 402 of the CWA. (App. 1b, 6b.)

B. The CWA is Clear: Ditches Are "Point Sources," not "Navigable Waters."

In both cases, the Corps has interpreted its regulations to deem the ditches in question "tributaries" so as to reach the wetlands adjacent to them. *See* 33 C.F.R. § 328.3(a)(5)

(tributaries); *id.* § (a)(7) (adjacent wetlands). The Corps's interpretation is unsupported by reference to any rule or guidance; its regulations do not define "tributary." For that matter, "tributary" and "adjacent wetlands" are nowhere defined in the CWA. Yet, the Court of Appeals deferred to the Corps's belief that a ditch is a "navigable water."

This was wrong. At 33 U.S.C. § 1362(14), Congress plainly stated that ditches are "point sources":

> The term "point source" means ***any*** discernible, confined and discrete conveyance, ***including but not limited to any*** pipe, ***ditch***, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged .... (Emphasis supplied.)

Exercises in construction "begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Obedience to text is especially due when Congress defines statutory terms. "[W]hen a statute includes an explicit definition [courts] must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). *See also W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502 (1945) ("statutory definitions of terms ... prevail over colloquial meanings"); *Lawson v. Suwanee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) ("Statutory definitions control the meaning of statutory words ...."). In Section 502(14), Congress could not have been clearer: a "point source" is *any* ditch, from which pollutants are or may be discharged.

CWA Section 502 defines two key terms: "navigable waters" at subsection (7), and "point source" at subsection

(14). 33 U.S.C. §§ 1362(7), (14). "The term 'navigable waters' means the waters of the United States, including the territorial seas." *Id.* at § 1362(7). By regulation, the Corps includes "tributaries" within the statutory phrase, "waters of the United States." 33 C.F.R. § 328.3(a)(5). "Ditch" is not included in either the CWA definition or in the Corps's regulation, but it is expressly identified in the Act's definition of "point source." Explicit definitions must prevail. *Western Union*, 323 U.S. at 502. Accordingly, the ditches at the *Rapanos* and *Carabell* sites are not "navigable waters." They are "point sources."

Additionally, specific statutory provisions govern over general provisions. *See, e.g., Edmond v. United States*, 520 U.S. 651, 657 (1997); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (internal quotes omitted). Although no specific kind of waterbody is listed in the "navigable waters" definition, that broad term may include bays, lakes, sounds, gulfs, rivers, streams and even non-navigable wetlands right next to truly navigable waters. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In contrast, Congress "specifically dealt with [ditches] in another part of the same enactment." *See Fourco*, 353 U.S. at 228 (citations omitted). Under the rule that specific provisions supersede general ones, the precise inclusion of "ditch" in the "point source" definition trumps an interpretation that ditches are somehow penumbral to the "navigable waters" definition.

Moreover, the "most important" rule of statutory construction "is the clear statement rule." I Laurence Tribe,

American Constitutional Law, § 5-9 at 853 (3d ed. 2000). Where, as here, an agency interprets a statute in a manner that "invokes the outer limits of Congress' power" or overrides the "usual constitutional balance of federal-state powers," this Court "expect[s] a clear indication that Congress intended that result" pressed by the agency. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 151, 172-73 (2001). The CWA contains no clear statement that a ditch is a "navigable water"—but the Act is unequivocal that a ditch is a "point source." To avoid difficult federalism questions, and to effectuate congressional policy "to recognize, preserve, and protect the primary role of States" in addressing water pollution (33 U.S.C. § 1251(b)), the Court should reject the interpretation that an ordinary ditch is a "navigable water."

Congress "left [no] gap for the agency to fill" in defining a ditch as a "point source," not as a "navigable water." *See Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984). It has spoken to the issue, "that is the end of the matter," and the Court must give effect to clearly expressed legislative intent under *Chevron* Step 1. *Id.* at 842. The Court of Appeals should therefore be reversed.

C. The "Discharge" Definition Further Clarifies that Ditches are not "Navigable Waters."

The "discharge" definition drives home the point that Congress did not intend for ditches and other "point source[s]" to be "navigable water[s]." The Act provides: "[D]ischarge of a pollutant" ... means ... any addition of any pollutant ***to*** navigable waters ***from*** any point source ...." 33 U.S.C. § 1362(12) (emphasis added). Under a plain reading of the statute, "point sources" are not themselves

statutory "navigable waters," but are features that convey pollutants and add them to "navigable waters."

Congress intended to control pollutant discharges through point source permit programs. CWA Section 402, the National Pollutant Discharge Elimination System ("NPDES"), requires point source operators to obtain permits for the addition of pollutants into navigable waters. 33 U.S.C. § 1342. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988) ("The NPDES permit program was designed to control 'point sources' of pollution"). Under Section 402, EPA regulates pollutants that exit point sources, not pollutants entering them. *See S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (explaining that point sources require permits when they convey pollutants to navigable waters). Similarly, Section 404 requires point source operators to obtain a Corps permit for discharges of a specific type of pollutant, namely, dredged or fill material. 33 U.S.C. § 1344. In short, operators must obtain Section 402 or 404 permits when pollutants leave ditches (or other point sources) and enter "navigable waters."

While *amicus* maintains that this case should be decided under *Chevron* Step 1 (*supra* at 6), the Corps's interpretation flips the CWA's regulatory scheme on its head and is unreasonable as well, also failing *Chevron* Step 2. "Discharge" is not the addition of pollutants from one "navigable water" into another "navigable water." *See Miccosukee*, 541 U.S. at 104-05 ("discharge" requires addition of pollutants from one "meaningfully distinct" waterbody to another, *through* a point source). If the Corps's interpretation is upheld, such a reading would require a federal permit for the Mississippi River where it discharges into the Gulf of Mexico. Moreover, the Corps's

current litigation argument is contrary to consistent regulatory statements it has made down the years that upland drainage ditches are *not* CWA "navigable waters."[2] "An agency interpretation of a relevant provision which conflicts with [its] earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 446 n.30 (1987) (citations omitted). Deference is not due, as here, to agency "litigating positions that are wholly unsupported by regulations, rulings or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

D. Like Ditches, Municipal Storm Sewer Systems are "Point Sources" and not "Navigable Waters."

Another type of point source is a municipal separate storm sewer system, or "MS4." This is pertinent to *Carabell,* because the Sutherland-Oemig Drain (*supra* at 3) is part of Macomb County's MS4. Under CWA Section 402 and Michigan Act 451 (Mich. Comp. Laws § 324.101 (1994)), the County maintains an NPDES permit for its MS4, which expressly includes the Sutherland-Oemig Drain. (App. 1b, 6b.) By virtue of its inclusion in the

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[2] *See* 40 Fed. Reg. 31,320, 31,321 (July 25, 1975) ("[d]rainage ditches have been excluded" from CWA jurisdiction); 48 Fed. Reg. 21,466, 21,474 (May 12, 1983) ("waters of the United States do not include the following man-made waters: (1) Non-navigable drainage and irrigation ditches excavated on dry land"); 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) ("We generally do not consider [drainage and irrigation ditches excavated on dry land] to be waters of the United States."); 67 Fed. Reg. 2020, 2087 (Jan. 15, 2002) (nationwide permit for reshaping drainage ditches in jurisdictional wetlands "does not apply to reshaping drainage ditches constructed in uplands since these areas are generally not waters of the United States").

Macomb County MS4, dirt and other pollutants conveyed through the Sutherland-Oemig Drain into navigable waters have been authorized under Section 402 of the Act. (App. 3b.) (It is unclear whether any of the ditches in *Rapanos* are part of an MS4.)

Congress amended the CWA in 1987 and added Section 402(p) which, among other things, required EPA to develop regulations for an MS4 permit program regarding stormwater discharges.[3] By putting the MS4 program in Section 402, Congress expressed its intent that MS4s are "point sources." EPA thereby defined "MS4" to track the Act's "point source" definition. *Compare* 33 U.S.C. § 1362(14) (*supra* at 4), *with* 40 C.F.R. § 122.26(b)(8).[4] Courts also recognize that storm sewers are point sources subject to NPDES permitting requirements. *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1379 (D.C. Cir.1977)

Permits for discharges from MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management

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[3] *See* 33 U.S.C. §§ 1342(p)(3)(B), (4). The history of the MS4 permit program, and its phased approach for regulation of municipalities based on their population size, is traced in *Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency*, 344 F.3d 832, 841-42 (9th Cir. 2003).

[4] EPA defines MS4 as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, *ditches*, man-made channels or storm drains)" owned and operated by a State or municipality and "[d]esigned or used for collecting or conveying storm water ...." 40 C.F.R. § 122.26(b)(8) (emphasis supplied).

practices, control techniques and systems, design, and engineering methods." 33 U.S.C. § 1342(p)(3)(B)(iii).[5] Modern MS4s are waste treatment systems because they reduce pollutants by treating stormwater with such features as settling structures to collect sediment, and racks to capture trash. Ben Urbonas, *et al.*, *Stormwater, Best Management Practices and Detention for Water Quality, Drainage, and CSO Management* 42, 416-433 (1993); *Design and Construction of Urban Stormwater Management Systems* 454, 489-511 (Am. Soc'y of Civil Eng'rs 1992). Indeed, EPA identifies stormwater as a "waste."[6] The key point is this: EPA expressly excludes "waste treatment systems" from the definition of "waters of the United States," *see* 40 C.F.R. § 122.2, and a recent memo from EPA's General Counsel and Assistant Administrator for Water confirms that "waste treatment systems" like MS4s are "by definition" *not* CWA "navigable waters." (App. 3c, at n. 18.)[7] When a third party discharges into an MS4, which itself discharges directly into a "navigable water," EPA "always addressed such discharges as 'discharges *through* [MS4s] as opposed

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[5] "Best management practices" include "treatment requirements." 40 C.F.R. § 122.26(d)(iv)(D).

[6] 40 C.F.R. § 122.26(b)(8)(i) (MS4 is a conveyance system owned and operated by a municipality with jurisdiction over the "disposal of sewage, industrial wastes, storm water, *or other wastes*") (emphasis supplied).

[7] Memorandum from Ann R. Klee, General Counsel, and Benjamin H. Grumbles, Assistant Administrator for Water, Environmental Protection Agency, to Regional Administrators, Regarding Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers, at 18, n. 18 (Aug. 5, 2005) (excerpts at App. C).

to 'discharges to waters of the United States ....'" 55 Fed. Reg. 47,990, 47, 997 (Nov. 16, 1990) (emphasis supplied).

"[A] statute is to be considered in all its parts when construing any one of them." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998). *See also Comm'r of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984) (court should "find that interpretation which can most fairly be said to be imbedded in the statute [and is] ... most harmonious with its scheme and with the general purposes that Congress manifested"). Section 402(p)'s structure and EPA's regulations make clear that MS4s are "point sources," not "navigable waters." As such, the Court of Appeals should be reversed for ruling in *Carabell* that the Sutherland-Oemig Drain is a "navigable water," because that ditch is part of the Macomb County MS4.

E. Classifying Ditches and MS4s as "Navigable Waters" Yields Unreasonable Results.

If the Corps's interpretation holds, all of the CWA's requirements and programs for "navigable waters" would be triggered for ditches and MS4s. But "statutes should be interpreted to avoid ... unreasonable results whenever possible." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). For example, Section 303 requires States to adopt and submit to EPA water quality standards ("WQSs"), 33 U.S.C. § 1313, which "consist of a designated use or uses for the waters of the United States ...." 40 C.F.R. § 131.3(i).[8] There are an estimated 3.9 million miles of roads

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[8] An example of a designated use: "All the Great Lakes, and their connecting waters ... are designated for ... coldwater fisheries." Mich. Admin. Code R. 323.1100(5) (1999).

in the Nation,[9] and regulations require that federally funded primary roads must be "designed ... and maintained to have adequate drainage, cross drains, and ditch relief drains." 30 C.F.R. § 816.151(d). If all of these roadside ditches are "navigable water," then the Act would require States to establish WQSs for all of them. Congress could not have intended such an absurd result. Similarly, if MS4s are "navigable waters," then Section 303 requires States to develop WQSs and "designated uses" for the water in municipal sewer systems. The main purpose of an MS4 is to transport stormwater away from upland areas. However, using a "navigable water" in such a manner would plainly violate EPA's regulation that "in no case shall a State adopt waste transport ... as a designated use for any water of the United States." 40 C.F.R. § 131.10(a).

In conclusion, the Corps's interpretation that drainage ditches and parts of an MS4 are "navigable waters" should not receive deference because it (1) contradicts the CWA's plain language, and (2) is unreasonable in any event. The Court of Appeals should be reversed because it erroneously held that "point sources" at the *Rapanos* and *Carabell* sites are CWA "navigable waters."

II. WETLANDS ADJACENT TO FEATURES THAT ARE NOT "OPEN WATERS" ARE NOT WITHIN CWA JURISDICTION AS A MATTER OF LAW.

Corps regulations provide that wetlands "adjacent" to certain listed waters (like "interstate waters" and

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[9] U.S. Department of Transportation, Federal Highway Administration, Highway Statistics 2001 § V, Roadway Extent, Characteristics, and Performance Tbl. HM-10, at <http://www.fhwa.dot.gov/ohim/hs01/hm10.htm> (last visited Nov. 10, 2005).

"tributaries") are jurisdictional under the CWA. 33 C.F.R. § 328.3(a)(7). This Court has considered the (a)(7) regulation in the past, ruling that wetlands which actually abut "open waters" are jurisdictional. The Court of Appeals should be reversed because it extended adjacency jurisdiction to wetlands that are next to drainage ditches, which are "point sources," and are not "open waters."

A. *Riverside Bayview* and *SWANCC*

This Court considered the adjacency regulation in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). It allowed the CWA to cover non-navigable wetlands that "actually abut[ted] on a navigable waterway," Black Creek. *Id.* at 135. The Court stated it was expressing no opinion on the status of "wetlands that are not adjacent to bodies of *open water*." *Id.* at 131, n. 8 (emphasis supplied). Then in *SWANCC*, the Court stressed that the *Riverside Bayview* wetlands "actually abutted on a navigable waterway" (531 U.S. at 167), and ruled against the Corps because "the text of the statute will not allow" coverage of ponds that "are *not* adjacent to open water." *Id.* at 168 (original emphasis). The dissent read the majority opinion as "excising" from the CWA waters "that are not contiguous or adjacent to navigable waters." *Id.* at 190, n. 14 (Stevens, J., dissenting).

B. This Court Treats "Open Waters" as Navigable-in-Fact Water.

Riverside Bayview and *SWANCC* used the term "open water" and "navigable waterway" interchangeably. Indeed, Black Creek is traditionally navigable-in-fact and has

supported heavy boat traffic.[10] In this regard, these opinions are part of the Court's long tradition of using the phrase "open water" as synonymous with navigable-in-fact water. For example, in *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 558 (1947), the Court explained that pilots take ships from "open waters" to local waters. In *United States v. Oregon*, 295 U.S. 1, 22 (1935), "open water" described the area where boats could be used. The Court has also analyzed whether the term "high seas" in a criminal statute applied "to the open, uninclosed waters of the Great Lakes, between which the Detroit River is a connecting stream." *United States v. Rogers*, 150 U.S. 249, 253 (1893). The Court observed, "the fact remains that there are other seas than the ocean, whose open waters constitute a free highway for navigation to the nations and people residing on their borders ...." *Id* at 256. *See also The Nevada v. Quick*, 106 U.S. 154, 158-59 (1883) (a steamship "may freely exercise its powerful propeller and sport its leviathan proportions on the ocean or in deep and open waters"). In short, the phrase "open water" abounds in maritime and admiralty cases, and it has consistently referred to navigable-in-fact water.

C. Likewise, Federal Agencies Understand "Open Water" to Mean Navigable-In-Fact Water.

Numerous federal regulations use the phrase "open water" similarly. For example, Federal Aviation Administration regulations require minimum safe altitudes for aircraft of 500 feet above the surface, "except over open

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[10] *See* The Macomb Daily, *Boat Jam*, (June 13, 2003), available at http://204.176.34.196/macombdaily/article.asp?ID=8560595 (reporting that several rivers including Black Creek experienced boat jams in warm weather so that public ramps had to be temporarily closed).

water or sparsely populated areas." 14 C.F.R. § 91.119. Similar restrictions apply for persons test flying aircraft "except over open water." 14 C.F.R. § 91.305. National Oceanic and Atmospheric Administration regulations, in 15 C.F.R. Pt. 921, App. II, define volcanic estuaries as "coastal bodies of open water ...." At 40 C.F.R. § 125.83, EPA defines a "[l]ake or reservoir [to] mean[ ] any inland body of open water with some minimum surface area free of rooted vegetation ...." The Department of Interior, in 43 C.F.R. Pt. 11, App. II, defines "landward open water" as "a body of water that does not contain vegetation, (e.g., wetland, seagrass, or kelp)." And regulations of the Department of Transportation state that facilities at which flammable solids are loaded or unloaded "must be located so that each vessel ... has an unrestricted passage to open water." 49 C.F.R. § 176.415(c)(4).

In opposing the petitions for writs of *certiorari,* the Corps contended that the term "open water" is "a shorthand for 'rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" Resp't Cert. Br. in Opp'n at 11, *Carabell v. United States Army Corps of Eng'rs,* No. 04-1384 (U.S. 2005); Resp't Cert. Br. in Opp'n at 14, *Rapanos v. United States,* No. 04-1034 (U.S. 2005). That position is emphatically belied by the overwhelming judicial and regulatory precedent, spanning decades, equating "open water" with navigable-in-fact water. No one coming upon the MS4 or ditches at the *Carabell* or *Rapanos* sites would think they had reached "open water." This Court's decisions simply do not sweep into CWA jurisdiction wetlands adjacent to ditches, drains, and MS4s.

Read in tandem, *Riverside Bayview* and *SWANCC* provide legal guideposts at opposite ends of the CWA jurisdictional spectrum. As a matter of law, the Corps (1)

has power over "open water" (*i.e.*, navigable-in-fact) and immediately abutting wetlands, but (2) *lacks power* over waters that are isolated from navigable-in-fact waters. The ditches at issue in these cases are not "open waters," so the wetlands next to them are not within Corps authority as a matter of law, and the Sixth Circuit should be reversed.

III. TO SATISFY THE "SIGNIFICANT NEXUS" PRINCIPLE, THE GOVERNMENT SHOULD PRODUCE PROOF OF DOWNSTREAM EFFECT ON NAVIGABLE-IN-FACT WATERS.

In Part I, *amicus* maintained that any non-navigable feature which is itself a "point source," such as a ditch or an MS4, is not a CWA "navigable water." In Part II, *amicus* explained that the CWA does not, as a matter of law, reach wetlands adjacent to ditches, MS4s, and other features that are not "open water." We submit that the Court of Appeals should be reversed on these points alone.

However, questions of CWA jurisdiction are by no means limited to "point sources" or wetlands immediately adjacent to "open water." For example, whether the CWA encompasses a non-navigable linear feature (like a remote tributary, creek, or stream) is a lingering question. Part III thus addresses the mode of analysis that should be employed to determine whether CWA jurisdiction encompasses non-navigable linear features in any given case. As discussed below, *SWANCC* has provided the legal standard to help answer this question: there must be a "significant nexus" to navigable-in-fact waters. This Part will flesh-out what that standard means, and what facts the Corps must adduce to satisfy that standard when it brings

an enforcement action against property owners regarding remote tributaries and the like.[11]

"Navigability ... is not susceptible of definition or determination by a precise formula which fits every type of stream or body of water under all circumstances and at all times." 78 Am. Jur. 2d Waters § 124 (May 2005). "[E]ach determination as to navigability must stand on its own facts." *United States v. Appalachian Power Co.*, 311 U.S. 377, 403 (1940) (quoting *United States v. Utah*, 283 U.S. 64, 87 (1931)). The same should hold true when determining the scope of CWA "navigable waters." Whether a particular tributary has a "significant nexus" to navigable-in-fact waters must be determined by considering all surrounding circumstances. Indeed, evidence of persistent, downstream *effects* on navigable-in-fact waters should be crucial to any "significant nexus" inquiry.

A. Historical Context

In England, virtually all navigable waterways are susceptible to the ebb and flow of the tide, so at common law "'tidewater' and 'navigability' were synonymous." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 478 (1988). Given the continental expanse of the United States, a "different test" was needed on these shores because "[s]ome of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water ...." *The Daniel Ball*, 77 U.S. 557, 563 (1870). Thus, the classic test is that American waters are "navigable in law when they are navigable in fact. And they are navigable in fact

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[11] The burden of proof is on the government when it asserts navigability. *See, e.g., Mundy v. United States*, 22 Cl.Ct. 33, 34 (1990); *United States v. 531.10 Acres in Anderson County, S.C.*, 243 F. Supp. 981, 986 (D.S.C. 1965).

when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade or travel are or may be conducted ...." *Id.* at 563.

As the Nation's population grew, so burgeoned our need for water. In the early 20th century, federal agencies (primarily the Corps and the Bureau of Reclamation in the Interior Department) commenced massive public works projects to harness rivers and streams for beneficial uses like irrigation, power, and water supply. *See generally* Marc Reisner, *Cadillac Desert: The American West and its Disappearing Water* (rev. ed. 1993). *The Daniel Ball* test, as it is limited to in-fact navigable waters, could not accommodate the Nation's unslakeable thirst. A more flexible formulation—not so strictly bound to the control of navigation—became necessary. Thus, in time, the Court recognized that federal power needed to encompass *non-navigable waters* that may be made navigable-in-fact with "reasonable improvements." *Appalachian Power,* 311 U.S. at 407-09 (1940). *See also Econ. Light & Power Co. v. United States,* 256 U.S. 113, 118 (1921) (non-navigable points on Des Plaines River "above the head of steamboat navigation" regarded as navigable-in-law).

Accordingly, what is "navigable" has changed over time, and congressional power may fairly encompass non-navigable features. But this is the crucial point: this Court has endorsed federal authority over non-navigable features only as needed to service the constitutional power to regulate navigation, which derives from the commerce authority.

> The plenary federal power over commerce must be able to develop properly with the needs of that commerce which is the reason for its existence. *It cannot properly be said that the federal power over*

> *navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce."*

Appalachian Power, 311 U.S. at 409 (emphasis supplied). The Court has thus upheld federal authority over non-navigable features, but only as necessary to effectuate the federal navigation power.

Indeed, federal authority over navigable-in-fact waters is "plenary," "as broad as the needs of commerce," and may be wielded for purposes other than navigation (like irrigation and hydropower). *Appalachian Power*, 311 U.S. at 426. Federal authority over non-navigable features is not nearly so broad, and has been sustained only upon findings and evidence that activities conducted in or upon such features will actually and demonstrably impact downstream navigable-in-fact waters. For example, in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), Congress had the power to prevent a state's appropriation of water, "even at a place above the limits of navigability," where such an appropriation "diminish[es] the volume of waters [flowing into] a navigable stream, to such an extent as to *destroy its navigability*." *Id.* at 709 (emphasis supplied). The Court examined international treaties, "affidavits and other evidence" to determine that the state's uses would "substantially interefere[] with the navigable capacity" of the Rio Grande and could be enjoined by federal statute. *Id.* at 708-09.

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941), is similar. The Court upheld congressional authority to control water flows over non-navigable stretches of the Mississippi River to prevent

flooding in the River's navigable-in-fact segments. *Id.* at 516-24. Extensive documentation through a legislative and engineering record allowed the Court to find that the activities in the upstream, non-navigable portion of the River had a "tangible" effect on the downstream, navigable portion. *Id.* at 524.

Accordingly, the Court has long taken a measured, cautious approach when determining the reach of federal power over non-navigable features. While flexibility is necessary as the needs for commerce evolve, traditional notions of navigability must always set the bounds on federal authority. The above cases are thus premised on regulating activities in non-navigable features only where they cause "substantial interference" with, and "tangible impact" on, downstream navigable-in-fact waters.

B. "Significant Nexus"

The rulings in *Riverside Bayview* and *SWANCC* fit comfortably within this historical context. In *Riverside Bayview,* the Court upheld federal CWA jurisdiction over non-navigable wetlands that "actually abut[ted] on a navigable waterway," Black Creek (474 U.S. at 135); the wetlands and the Creek were "inseparably bound up" with each other. *Id.* at 134. Given their physical inseparability, any discharge of pollutants into the non-navigable wetlands would have a direct impact on the immediately adjacent, navigable-in-fact Creek. *SWANCC* stressed that the *Riverside Bayview* holding "was based in large measure on Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters." *SWANCC,* 531 U.S. at 167. Accordingly, finding no inseparable relationship between non-navigable ponds isolated from

navigable-in-fact waters, the Corps's claim of jurisdiction over the isolated ponds "exceed[ed] the authority ... under Section 404(a) of the CWA." *Id.* at 174.

In reinforcing the need for an "inseparable" relationship between non-navigable features and navigable waters, the *SWANCC* Court stated: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes.*" 531 U.S. at 167 (emphasis supplied). The "significant nexus" standard artfully captures the need to both maintain and keep flexible the traditional notions of navigability. To achieve the vital goal of cleaning-up our Nation's waters, Congress afforded "limited import" to the term "navigable" as used in the CWA, so as "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview,* 474 U.S. at 133. Meanwhile, that "classical understanding" provides the very constitutional basis for congressional action:

> The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact, or which could reasonably be so made.

SWANCC, 531 U.S. at 172 (citing *Appalachian Power,* 311 U.S. at 407-08). "Significant nexus" grounds the Act's scope to navigable-in-fact waters, while affording "limited import" to traditional jurisdiction by allowing federal authority to sometimes reach non-navigable features.

C. Hydrologic Connection Alone does not Satisfy the "Significant Nexus" Standard.

The cases at bench upset this careful balance. The Court of Appeals, by endorsing the Corps's hydrologic connection theory of jurisdiction, tipped all of the weight toward the "limited import" side at the expense of the "traditional jurisdiction" side. *Carabell* found CWA jurisdiction over wetlands adjacent to "a nonnavigable ditch abutting their property, a ditch that flows *one way or another* into other tributaries of navigable waters ...." 391 F.3d at 710 (emphasis supplied). In *Rapanos*, the Court of Appeals deemed "adjacent *waters*" (not simply *wetlands*) jurisdictional by concluding that a "significant nexus ... can be satisfied by the presence of a hydrological connection." 376 F.3d at 639. *See also United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) (criminal phase; "ample nexus" is sufficient). Both cases rely heavily on the Fourth Circuit's decision in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004), which endorsed CWA jurisdiction where there is simply "*a* nexus" to navigable-in-fact waters, and construed *SWANCC* as "*suggesting* that covered nonnavigable waters are those with *'some connection'* to navigable ones." *Id.* at 709 (emphasis supplied). *Deaton* is universally cited for the proposition that "jurisdiction extends over any branch of a tributary system that *eventually flows* into a navigable body of water." *Id.* at 711 (emphasis supplied).

The purposeful choice of words selected by these Courts of Appeals disserves this Court's "significant nexus" requirement. *Riverside Bayview* and *SWANCC* never "suggested" that federal CWA authority depended on an "eventual flow" of water "one way or another," or that

"a" nexus or "some" connection is all that is needed to trigger the Corps's power. Rather, this Court announced that the standard is a "significant nexus."

Amicus respectfully urges the Court to reject the hydrologic connection theory as a stand-in or substitute for "significant nexus," because the Corps's approach supports CWA jurisdiction—as a matter of law—based on nothing more than the presence of a route along which water molecules may possibly migrate. For example, *Carabell* upheld a grant of summary judgment in the Corps's favor (391 F.3d at 707), based on a record that simply traced a course between wetlands next to "an unnamed ditch," which connected to a drain, then to a creek, and eventually to the Great Lakes. *Id.* at 708. *Rapanos* upheld a criminal conviction solely based on testimony of a state official who "followed the flow of water" and discerned "a surface connection between the Salzburg site and the Saginaw Bay." *Rapanos,* 376 F.3d at 642. Likewise, *Deaton* granted motions for summary judgment, and to reconsider CWA jurisdiction, in favor of the Corps. *Deaton,* 332 F.3d at 703. The Fourth Circuit found CWA jurisdiction merely due to a "winding thirty-two mile path" between a roadside ditch and the Chesapeake Bay (*id.* at 702), through which drops of water "eventually flow" (*id.* at 711) and "ha[ve] the potential" to carry pollutants downstream. *Id.* at 707. The most extreme example of the hydrologic connection theory that *amicus* has located is *United States v. Buday,* 138 F. Supp. 2d 1282 (D. Mont. 2001). It stretched the CWA to reach a non-navigable creek, solely due to a 190-mile linear connection to the closest navigable-in-fact water. *Id.* at 1283.

The federal government has won these cases by playing a game of six degrees of separation (one way or another).

To justify CWA jurisdiction, the Corps deems unnecessary facts like the amount, direction, duration, and frequency of water flow. But such facts regarding the *extent* of hydrologic *exchange* (not simply distance) between non-navigable and navigable resources should be critical to the "significant nexus" calculus. Put another way, a hydrologic connection is a prerequisite to prove a *nexus*, but that alone does not prove the nexus is *significant.*[12]

D. *Effect* on Navigable-in-Fact Waters Must be Imported into a "Significant Nexus" Analysis.

The hydrologic connection theory is a conspicuous detour from the path charted by this Court, dating back to *The Daniel Ball* and up through *SWANCC,* because it is not moored to any showing that upstream activity in a non-navigable area causes an actual, downstream impact on navigable-in-fact water. The Fifth Circuit's decision in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is instructive. The *Rice* court rejected claims of CWA jurisdiction over intermittent streams, *even though some connection to navigable waters existed:*

> There is no detailed or comprehensive description of any of these seasonal creeks available in the record. There is also very little evidence of the nature of Big Creek itself .... There is no detailed information about how often the creek runs, about how much water flows through it when it runs, or about whether the creek ever flows directly (above ground) into the Canadian River. *In short, there is*

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[12] The common meaning of "significant" is "[h]aving or likely to have a major effect; important." The American Heritage® Dictionary of the English Language (4th ed. 2000).

> ***nothing in the record that could convince a reasonable trier of fact*** that either Big Creek or any of the unnamed other intermittent creeks on the ranch are sufficiently linked to an open body of navigable water....

Id. at 270-71 (emphasis supplied).

A district court decision regarding the New Jersey Meadowlands is also on point. In *FD&P Enters., Inc. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509 (D.N.J. 2003), the court couched the question as "whether there is a substantial nexus—beyond a mere hydrologic connection—between the [property] and the navigable waters of the Hackensack River." *Id.* at 516-17. The *FD&P* court decided it could not grant summary judgment in favor of the Corps because, following *SWANCC*, "'hydrological connection' is ... [not] the relevant standard ...." *Id.* at 517. Summary judgment was also not granted for the property owner, because "the evidence submitted by the parties does not permit this court to conclude that no genuine issue of material fact exists *as to the effect* of the filling of the wetlands on the Hackensack River." *Id.* (emphasis supplied).

Thus, the government should not win a motion for summary judgment (or some other dispositive motion on the law), where material facts are disputed or lacking regarding the impact on downstream navigable-in-fact waters. Whether a non-navigable feature is subject to CWA jurisdiction under the "significant nexus" standard must be based on solid proof showing an on-going *impact or effect* on downstream navigable waters. Considering impact is fully consistent with seminal cases like *Appalachian Power* and *Rio Grande Dam*, which have

allowed the extension of federal authority over non-navigable features based on evidence of a persistent, deleterious downstream effect. *See supra* at 18-20.

E. Requiring Proof of Effect is Consonant with the CWA's Objective to Prevent Actual Discharges of Pollutants.

Requiring the Corps to show downstream impact on navigable-in-fact waters makes all the more sense in the modern context, given the CWA's overriding regulatory objective to prohibit the unpermitted discharge of pollutants. *Supra* at 2. The federal government has no CWA authority to require a permit for activities that may only result in a *potential* discharge of pollutants.

> In the absence of an *actual addition* of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, ... and no statutory obligation of point sources to seek or obtain [a CWA] permit in the first instance.

Waterkeeper Alliance, Inc., v. U.S. Envtl. Prot. Agency, 399 F.3d 486, 505 (2d Cir. 2005) (emphasis supplied).

Enforcement actions brought by the Corps are typically based on alleged discharges of common dirt—the pollutant at issue—without a permit. Thus, at the very least, the government should be required to produce evidence showing that the upstream activities it seeks to regulate cause dirt to migrate off-site and enter the hydrologic flow. How can there be an actual discharge of sediment, if sediment never leaves a construction site and is not transported downstream? But there is no such evidentiary showing in *Carabell, Rapanos,* or other hydrologic

connection cases, because they are not premised on an actual discharge of pollutants, but rather on the assumption that a pollutant "*has the potential* to move downstream and degrade the quality of the navigable waters themselves." *Deaton*, 332 F.3d at 707 (emphasis supplied). In short, if the Corps's "hydrologic connection" theory is the standard, all it needs to prove is that a ditch connects to a creek, which connects to a stream, which connects to a river, which is all part of a tributary system, that contributes downstream flow.

Yet Congress did not prohibit the *potential* addition of *water* to "navigable water," but the *actual* addition of *pollutants* to "navigable water." Polluting activities in non-navigable features that result in an actual discharge must be regulated. However, that outcome can be obtained without deeming a common drainage ditch and every inch of its downstream path a CWA "navigable water."

To this end, several reported decisions, where there is clear evidence of an actual discharge of pollutants, needlessly go too far in alchemizing certain non-navigable features into statutory "navigable waters." In *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 528 (9th Cir. 2001), toxic herbicides were discharged through irrigation canals into Bear Creek, where "[o]ver 92,000 juvenile steelhead were killed." In light of that proof of environmental harm from an actual discharge of pollutants through point sources, it was entirely unnecessary for the court to rule that the canals (that is, "point sources") were "tributaries" encompassed by the CWA. *Id.* at 533. Likewise, in *United States v. Eidson*, 108 F.3d 1336, 1340, 1342 (11th Cir. 1997), the appellant was caught pumping a "sludge substance" from a truck, through a hose, which flowed into a storm sewer. (The truck, the hose, and the

sewer system were all point sources.) The flow then left the sewer and entered a *tidal* drainage canal that directly emptied into Tampa Bay. *Id.* at 1342-43. Under those facts, it was not necessary for the court to declare the sewer system a CWA jurisdictional "tributary of Tampa Bay" to affirm the criminal convictions. *Id.*

These cases warrant comparison to *In re Needham*, 354 F.3d 340 (5th Cir. 2003), where federal regulatory jurisdiction was *upheld* based on the parties' factual stipulation that "residue from the spill was found 10-12 miles from the oil well, *i.e.*, in Bayou Folse," an undisputed traditionally navigable water. *Id.* at 346. In affirming federal regulatory authority, the Fifth Circuit nonetheless declared the hydrologic connection theory as "unsustainable under *SWANCC*," and *refused* to extend federal power "over puddles, sewers, roadside ditches, and the like." *Id.* at 345. *Needham* perfectly shows that a polluting activity can be regulated under the CWA without federalizing the place—as long as there is an actual, discernible discharge of pollutants through a point source and into downstream, navigable-in-fact waters.

F. The "Significant Nexus" Standard is Analogous to a Proximate Cause Requirement.

Whether a non-navigable feature has a "significant nexus" to a navigable water is another "difficult question[] of proximity and degree" for this Court. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 708 (1995). Federal environmental regulations are commonly premised on a threshold showing of "significant" effects. In *Sweet Home*, for example, the Court upheld a U.S. Fish and Wildlife Service regulation under the Endangered Species Act, which defined "harm"

to species as including "*significant* habitat modification." 50 C.F.R. § 17.3. The majority observed that "every term in the regulation's definition of 'harm' is subservient to the phrase 'an act which *actually* kills or injures wildlife." *Id.* at 700 (emphasis supplied). Justice O'Connor's concurrence upheld the regulation because it "is limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals." *Id.* at 708-09. She further noted that the activity in question must be the proximate and foreseeable cause of the species' actual injury. *Id.* at 709. Proximate cause "is about the legal *significance* of causation, rather than the existence of causation." Dan B. Dobbs, *The Law of Torts* § 167, 409 (2000) (original emphasis). "These questions must be addressed in the usual course ... through case-by-case resolution and adjudication ..." *Sweet Home*, 515 U.S. at 713.

Similarly, the National Environmental Policy Act (NEPA) requires the preparation of an environmental impact statement for major federal actions "significantly affecting" the quality of the human environment. 42 U.S.C. § 4332(2)(C). Regulations state that "'[s]ignificantly' as used in NEPA requires consideration of both context and intensity," with "intensity" bearing on "the severity of the impact" and including evaluation of "[t]he degree to which the proposed action affects public health or safety." 40 C.F.R. § 1508.27(b). Thus, "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause[,]" an approach analogous "to the 'familiar doctrine of proximate cause from tort law.'" *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) (citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

Perhaps *SWANCC*'s "significant nexus" standard is best designed to ensure that upstream activity in a non-navigable feature proximately causes concrete, actual harm to navigable-in-fact waters further downstream. *See Rice*, 250 F.3d at 272 (requiring a "close, direct, and proximate link between ... [the] discharges of oil and any resulting actual, identifiable oil contamination"). The "hydrologic connection" theory, however, with its premise on potential impacts and eventual flows, is nothing more than a variant of "but for" causation. Such a loose causal relationship should not be the standard by which the federal government can assert its awesome regulatory power under the CWA. The Corps should be required to prove more than a "but for" connection when it brings CWA enforcement actions against private land owners.

CONCLUSION

The judgments of the Court of Appeals should be reversed.

DATED: December 2, 2005

Respectfully submitted,

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C. Excerpts from Memorandum from Ann R. Klee, General Counsel, and Benjamin H. Grumbles, Assistant Administrator for Water, U.S. Environmental Protection Agency, to Regional Administrators, Regarding Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers (Aug. 5, 2005) 1c

*Under Rule 32.3, *Amicus* will lodge complete copies of the documents in Appendices B and C at the Court's request.

Cases in which the National Association of Home Builders has appeared before the U.S. Supreme Court as an amicus curiae:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City & County of San Francisco*, 125 S. Ct. 2491 (2005); *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074 (2005); and *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

JENNIFER M. GRANHOLM
GOVERNOR

STEVEN E. CHESTER
DIRECTOR

December 17, 2003

Ms. Lynn Yustick
Macomb County Public Works Office
115 South Groesbeck Highway
Mount Clemens, Michigan 48043

Dear Ms. Yustick:

SUBJECT: National Pollutant Discharge Elimination System (NPDES)
Certificate of Coverage No. MIG610052
Designated Name: Macomb Co MS4

Your certificate of coverage under NPDES General Permit No. MIG619000 has been processed in accordance with appropriate State and Federal regulations.

Please carefully review the requirements contained in Certificate of Coverage No. MIG610052, which is enclosed, and General Permit No. MIG619000. If you do not have a copy of the General Permit, one can be obtained via the Internet at: (http://www.michigan.gov/deq - on the left side of the screen click on Water, Surface Water, and NPDES Permits; then click on "General NPDES Permits" which is under the Permits banner), or you may call the following number to request a paper copy: (517) 373-8088. These requirements are subject to the criminal and civil enforcement provisions of both State and Federal law.

Permit compliance and violations are audited by the Department of Environmental Quality (DEQ) and the United States Environmental Protection Agency.

You must comply with the requirements and other responsibilities in accordance with General Permit No. MIG619000 and Certificate of Coverage No. MIG610052. A guidance document is enclosed to help you develop your Public Participation Process, which shall be submitted by the date specified in your certificate of coverage. Any reports, notifications, or questions regarding the NPDES program, the enclosed certificate of coverage, or the general permit-should be directed to the DEQ office indicated on your certificate of coverage.

Sincerely,

Christe Alwin

Christe Alwin
Lakes Erie and Huron Permits Unit
Surface Water Permits Section
Water Division
517-241-7414

CA/sea

Enclosures: Certificate of Coverage No. MIG610052
Public Participation Process Guidance Document

cc: Mr. Phil Argiroff, Southeast Michigan District Office, Water Division, DEQ (with COC)
PCS Unit, Water Division (with COC)
File

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

DEQ WATER DIVISION

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)

Authorized by Michigan Act 451, Public Acts of 1994, as amended, Part 31

CERTIFICATE OF COVERAGE

Under General Permit No. MIG619000
MS4 Watershed General Permit

CERTIFICATE OF COVERAGE NO.: MIG610052

DESIGNATED NAME: Macomb Co MS4

PERMITTEE MAILING ADDRESS: Macomb County 115 South Grocsbeck Highway Mount Clemens, Michigan 48043

This certificate of coverage authorizes Macomb County to discharge storm water through a separate storm water drainage system to waters of the state, including but not limited to the Clinton River, Lake St. Clair, Stony Creek, and the drains listed in Table I (attached). This authorization also includes nested jurisdictions for which the permittee has accepted responsibility. The applicable watersheds for this certificate of coverage and general permit are the Anchor Bay, Lake St. Clair Direct Drainage, Paint/Stony Creek, Red Run, Clinton River East and North Branch Clinton River.

The permittee shall submit an Illicit Discharge Elimination Plan and Public Education Plan, or updates to existing plans to comply with current permit requirements on or before November 1, 2004. The permittee shall begin implementation of its Illicit Discharge Elimination Plan and its Public Education Plan upon receiving approval from the Department or beginning 90 days after submittal, whichever comes first.

The general permit allows the permittee to implement one Storm Water Pollution Prevention Initiative for their jurisdiction. After the permittee develops and submits a Storm Water Pollution Prevention Initiative, all other Initiative submissions shall be developed as revisions to the existing Initiative. This Initiative shall be consistent with all of the permittee's authorizations as described below.

* * *

For the Lake St. Clair Direct Drainage watershed, the permittee, in conjunction with other permittees in the watershed, shall submit a joint Public Participation Process (Part I.B.1. of the permit) by May 1, 2004 and a joint Watershed Management Plan (Part 1.B.1. of the permit) by November 1, 2006. Based on development of the additional watershed plan, the permittee shall submit a revised Storm Water Pollution Prevention Initiative (or written determination not to revise the Initiative) (Part I.B.2.b. of the permit) by May 1, 2007. The permittee shall also submit a joint revised Watershed Management Plan (or written determination not to revise the Plan) (Part I.B.1. of the permit) by November 1, 2008 and any additional revisions to the Storm Water Pollution Prevention Initiative (or written determination not to revise the Initiative) (Part I.B.2.b. of the permit) by May 1, 2009.

* * *

The permittee shall submit an annual progress report by November 1st of each year beginning on or before November 1, 2004.

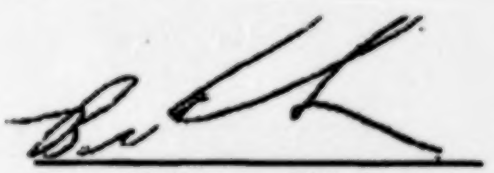
References in the general permit to the Department shall be defined as the Southeast Michigan District Supervisor of

the Water Division. The Southeast Michigan District Office is located at 38980 Seven Mile Road, Livonia, Michigan 48152-1006, telephone: 734-953-8905, fax: 734-953-1467.

* * *

This certificate of coverage is based on a complete application received by the Department of Environmental Quality on May 29, 2003. The permittee is subject to all conditions specified in General Permit No. MIG619000 issued December 5, 2002, expiring April 1, 2008. This certificate of coverage may be modified, terminated, reissued, or revoked as allowed for in General Permit No. MIG619000. On the effective date of this certificate of coverage, this certificate of coverage shall supersede Certificate of Coverage No. MIG610052, issued August 6, 2001, which is hereby revoked on the effective date of this certificate of coverage.

This certificate of coverage takes effect on the date of issuance.



December 16, 2003
Date Issued

Bryce Feighner, Chief
Lakes Erie and Huron Permits Unit
Surface Water Permits Section
Water Division

EQP 4677 (9/03)

Table 1. List of Drains under the jurisdiction of the MCPWO

'16 and One-Half Mile Drain'
'17 Mile Road Drain & Branches'
'18 Mile Drain'
'Ahrens Drain'
'Alexander Relief Drain and Branches'
'Alwardt Drain'
'Andersen Drain'
'Anderson East Branch Drain'
'Apel Drain'
'Armada and Ray Drain'
'Arndt Drain'
'Asbery Park Drain'

* * *

'Savan Drain'
'Savan Extension Drain'
'Schiebel Drain'
'Schocke Retention'

* * *

'Sutherland-Oemig Drain'

* * *

'Yates Branch Drain'
'Yates Drain'
'Zander Drain'

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

AUG - 5 2005

SUBJECT: Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers

FROM: Ann R. Klee
General Counsel

Benjamin H. Grumbles
Assistant Administrator for Water

TO: Regional Administrators

This Agency interpretation addresses the question of whether the National Pollutant Discharge Elimination System (NPDES) permitting program under Section 402 of the Clean Water Act (CWA) is applicable to water control facilities that merely convey or connect navigable waters. For purposes of this Agency interpretation, the term "water transfer" refers to any activity that conveys or connects navigable waters (as that term is defined in the CWA) without subjecting the water to intervening industrial, municipal, or commercial use. This interpretation focuses exclusively on water transfers and is not relevant to whether any other activity is subject to the CWA permitting requirement.[1]

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1 Section VI, below, discusses activities that are beyond the scope of, and not affected by, this Agency interpretation.

I. Overview

The question of whether or not an NPDES permit is required for water transfers has arisen because activities that result in the movement of navigable waters, such as trans-basin transfers of water to serve municipal, agricultural, and commercial needs, can also serve to move pollutants from one waterbody (donor water) to another (receiving water). The Supreme Court recently addressed this issue in South Fla. Water Mgmt. Dist., v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), leaving the matter unresolved.[2]

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2 In this case, the Supreme Court vacated a decision by the 11th Circuit, which had held that a Clean Water Act permit was required for transferring water from one navigable water into another, a Water Conservation Area in the Florida Everglades. The Court remanded the case for further fact-finding as to whether the two waters in question were "meaningfully distinct." If they were not, no permit would be required. The Court declined to address legal arguments made by the parties because the arguments had not been raised in the lower court proceedings. The Court noted that EPA had not spoken to these legal issues in an administrative document. 541 U.S. at 107.

* * *

* * *

VI. Scope of this Agency Interpretation

This Agency interpretation addresses only water transfers - that is, activities that convey or connect navigable waters without subjecting the water to intervening industrial, municipal or commercial use.[18] It does not address any other activities, or any jurisdictional terms under the statute other than "addition."[19]

For example, this interpretation does not affect EPA's longstanding position that, if water is withdrawn from navigable waters for an intervening industrial, municipal or commercial use, the reintroduction of the intake water and associated pollutants is an "addition" subject to NPDES permitting requirements. EPA has long imposed NPDES requirements on entities that withdraw process water or cooling water and then return some or all of the water through a point source. See, e.g., 40 C.F.R. § 122.2 (definition of process wastewater); 40 C.F.R. §§ 125.80-125.89 (regulation of cooling towers); 40 C.F.R. § 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 C.F.R. Part 132,

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18 We emphasize, for purposes of clarity, that a water transfer occurs between two "waters of the United States." Accordingly, the movement of water through a dam is not a water transfer because the dam merely conveys water from one location to another within the same waterbody (although the movement of water through a dam also does not require an NPDES permit because no "addition" has occurred). Moreover, a discharge from a waste treatment system, for example, which by definition is not a water of the United States, to a water of the United States, would not constitute a water transfer (and would require an NPDES permit). See 40 C.F.R. § 122.2.

19 Thus, this interpretation does not address the meaning of the terms, "point source," "pollutant" or "navigable waters."

Appendix F, Procedure 5-D (containing regulations governing water quality-based permitting for intake pollutants in the Great Lakes). Conversely, waters that are diverted and used for irrigation and then reintroduced to the navigable waters are exempt from permitting requirements under the exemption for return flows from irrigated agriculture from the definition of "point source" in section 502(14) and this Agency interpretation does not affect that exemption.

* * *

VII. Conclusion

For the reasons explained above, based on the CWA as a whole, the Agency concludes that Congress intended to leave the oversight of water transfers to authorities other than the NPDES program. While resort to a case-specific evaluation of waters is not necessary or appropriate in light of Congressional intent, if such an evaluation were determined to be needed, a permit would not be required for waters that are not "meaningfully distinct" and that term should be construed in light of the water quality goals of the statute and Congressional intent to rely on non-NPDES authorities for overseeing water management activities. Finally, the Agency intends to initiate a rulemaking process to address water transfers.